Supreme Court, U.S.
FILED

951033 DEC 26 1995

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

JAMES BALLY,

Petitioner,

vs.

MIKE KEMNA, WARDEN, WESTERN MISSOURI CORRECTIONAL CENTER AT CAMERON, MISSOURI AND THE ATTORNEY GENERAL OF THE STATE OF MISSOURI,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eighth Circuit Court of Appeals erred in determining that the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution does not bar prosection of vehicular assault and manslaughter after acceptance of a guilty plea by the Defendant to the lesser included offense of driving while intoxicated.

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The Opinion of the United States District Court for the Western District of Missouri, Western Division, 94-6155-CV-SJ-6 granting Petitioner's Petition for Habeas Corpus is not officially reported. (Appendix 13). The decision of the United States Court of Appeals for the Eighth Circuit denying the District Court's Order is reported at 65 F.3d 104 (8th Cir. 1995). (Appendix 1). The decision of the United States Court of Appeals denying Petition for Rehearing and Petition for Rehearing En Banc, dated October 13, 1995, is not officially reported. (Appendix 28). The decision of the Missouri Court of Appeals for the appeal of the state conviction which occurred prior to the filing of the Petition for Habeas Corpus is reported at 869 S.W.2d 777 (Mo. App. 1994) (Appendix 20)

JURISDICTION

Petition was convicted of vehicular manslaughter and vehicular assault on October 19, 1992 in the Circuit Court of Missouri, Buchanan County. Petitioner appealed from that conviction, raising the Double Jeopardy grounds asserted herein, but was denied relief on appeal. The Opinion rendered by the Missouri Court of Appeals is reported at 869 S.W.2d 777 (Mo. App. 1994). Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Missouri pursuant to 28 U.S.C. Section 2254 on October 17, 1994. The Honorable Howard F. Sachs granted a writ of habeas corpus on January 23, 1995. Respondents appealed that

decision to the United States Court of Appeals for the Eighth Circuit. After briefing by both parties and oral argument, the Eighth Circuit Court of Appeals rendered its Opinion reversing the District Court's Order on September 7, 1995. A timely filed Petition for Rehearing was denied on October 13, 1995.

This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On December 2, 1991 in Case No. CR691-925M, the State of Missouri charged Petitioner with driving while intoxicated. On that same date, the State charged Petitioner with vehicular assault in a completely separate case, Case No. CR591-906F. The charges for both cases

were based upon the same action by Petitioner. The State sought different punishments on both charges.

Petitioner pleaded guilty to the charges of driving while intoxicated in Case No. CR691-925M on December 9, 1991. The State was present at the plea and offered no objection to the plea. The State concedes that it knew a death had occurred as a result of Petitioner's vehicular accident at the time the plea was entered. The court accepted the plea, ordered a presentence investigation and scheduled a sentencing hearing for January 23, 1992.

Almost three weeks later, on December 27, 1991, the State requested, and was granted leave to file Nolle Prosequi in Case No. CR691-925M. Although Petitioner's guilty plea had previously been accepted unconditionally, leave was granted and the State filed a written entry of Nolle Prosequi on that same date.

On February 14, 1992, the State amended the charges in Case No. CR591-906F to add Court II, charging the Petitioner with involuntary manslaughter. A trial ensued and Petitioner was convicted of vehicular assault and vehicular manslaughter. Petitioner appealed to the Missouri Court of Appeals, raising the Double Jeopardy issue asserted herein. Petitioner's conviction was affirmed by the Missouri Court of Appeals in *State v. Bally*, 869 S.W.2d 777 (Mo. App. 1994).

On October 17, 1994, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Western District of Missouri based on Double Jeopardy grounds pursuant to 28 U.S.C. Section 2254. The District Court entered an Order granting the Petition for Writ of Habeas Corpus and entered Judgment directing

Petitioner's sentences to be vacated. A Notice of Appeal was filed on February 17, 1995 by the Respondents. The United States Court of Appeals for the Eighth Circuit entered an Order reversing the District Court's Order on September 7, 1995. A timely filed Petition for Rehearing was denied on October 13, 1995.

REASONS FOR GRANTING THE WRIT

THE EIGHTH CIRCUIT COURT OF APPEALS ERRED IN DETERMINING THAT THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT DOES NOT BAR PROSECUTION OF VEHICULAR ASSAULT AND MANSLAUGHTER AFTER ACCEPTANCE OF A PLEA TO THE LESSER INCLUDED OFFENSE OF DRIVING WHILE INTOXICATED

A. The Eighth Circuit Court of Appeals has decided a federal question in a way that conflicts with applicable decisions of this Court.

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656, 664 (1969). This case involves a second prosecution for the same offense after conviction, in violation of the Double Jeopardy Clause.

In the case at bar, the State of Missouri simultaneously charged Petitioner with driving while intoxicated in one case and vehicular assault in another case.

(The State concedes that the DWI charges is a lesser included offense of vehicular assault and vehicular manslaughter.) The lesser offense, driving while intoxicated, was resolved by the Petitioner pleading guilty to that charge. The Court held a hearing on the DWI charge at which time the Petitioner made sufficient statements to the Court to establish a factual basis for the plea. The Court accepted the plea, ordered a presentence investigation and scheduled a later hearing for imposition of the sentence. The State attended the plea and, without objection to the plea, listened to the statements made by Petitioner to establish the factual basis. Almost three weeks later, with no new circumstances having occurred, the State requested leave to nolle prosse the DWI charge so that it could amend the vehicular assault charges to add a vehicular manslaughter charge and pursue that case.

The Eighth Circuit Court of Appeals, in its opinion below, assumed that jeopardy attached at the time Petitioner pleased guilty to driving while intoxicated. Stating that the attachment of jeopardy begins rather than ends the double jeopardy analysis, however, the Court held that prosecution on the greater charges of vehicular assault and vehicular manslaughter were not barred by the Double Jeopardy Clause because the plea to the lesser included offense of driving while intoxicated could not constitute an implied acquittal of the greater charges since the DWI charges and the assault/manslaughter charges were brought in separate cases. The Eighth Circuit's opinion conflicts with this Court's holdings in *Jeffers v. United States*, 432 U.S. 137, 97 S.Ct. 2207, 53 L.Ed.2d 168 (1977) and *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977).

This Court has held that what lies at the heart of the Double Jeopardy Clause is the prohibition against multiple prosecutions for the same offense. *Jeffers v. United States*, 432 U.S. 137, 150, 180, 97 S.Ct. 2207, 2216, 53 L.Ed.2d 168, 180 (1977). According to the dictates of *Jeffers*, greater and lesser included offenses are to be resolved in one proceeding. *Jeffers v. United States*, 432 U.S. 137, 152, 97 S.Ct. 2207, 2217, 53 L.Ed.2d 168, 181 (1977). Failure to do so bars prosecution on the second charge once one of the charges has been resolved, regardless of which charge is resolved first. Therefore, because the lesser DWI charge was resolved, prosecution on the remaining greater charges (assault and manslaughter) which were separately charged should not have occurred. Nevertheless, the Court of Appeals allowed the prosecution to nolle prosse the charge of driving while intoxicated and pursue the assault and manslaughter charges, even though the Court had already accepted a guilty plea for the lesser DWI charge. The ensuing trial and conviction for vehicular assault and vehicular manslaughter violated Petitioner's right to be free from Double Jeopardy.

In *Brown v. Ohio*, 432 U.S. 161, 97 S.Ct. 2221, 53 L.Ed.2d 187 (1977) the State first charged the defendant with "joyriding" – operating an automobile without the owner's consent. The defendant pleaded guilty to the charges. When the State subsequently attempted to charge the Defendant with auto theft, this Court held that the prosecution was barred by the Double Jeopardy Clause since the defendant had previously been convicted of the lesser included offense of joyriding in a separate pleading. The same situation lies here; the court

accepted the defendant's plea to the charge of driving while intoxicated in one proceeding and prosecution of greater charges were pursued in a completely separate proceeding. Just as in the case at bar, the *Brown* defendant was not faced with the greater charges in the first proceeding and resolution of the lesser charge could not, therefore, be an implied acquittal of the greater charges, yet this Court held that the subsequent attempted prosecution for the greater offense was barred by the Double Jeopardy Clause. The Eighth Circuit Court of Appeals should have reached the same conclusion.

This Court has said that attachment of jeopardy does begin rather than end the Double Jeopardy analysis. *Illinois v. Somerville*, 410 U.S. 458, 467, 93 S.Ct. 1066, 1072, 35 L.Ed.2d 425 (1973). There are exceptions to the rule that a second prosecution violates the Double Jeopardy Clause. *Jeffers v. United States*, 432 U.S. 137, 153, 97 S.Ct. 2207, 2217, 53 L.Ed.2d 168, 181 (1977). The rationale for those exceptions, however, do not turn on whether or not the plea to the lesser offense constitutes an implied acquittal to the greater charges. They center instead on the reasons the State is seeking a subsequent prosecution. One commonly recognized exception in when all the events necessary to the greater crime have not taken place at the time the lessor crime is resolved. Another exception is when the defendant expressly asks for separate trials on the greater and lesser offenses. An exception also lies where the Defendant caused the abortion of the first prosecution (through a withdrawal of his plea, request for a mistrial, etc.) Where these exceptions lie, the policy behind the Double Jeopardy Clause does not require prohibition of

the second trial. *Jeffers v. United States*, 432 U.S. 137, 152, 97 S.Ct. 2207, 2216, 54 L.Ed.2d 168, 180 (1977).

This case does not fall within any of the exceptions established by this Court. In the case at bar, the State chose to charge the Petitioner with greater and lesser offenses in separate cases; the Defendant did not request separate trials. The Defendant did not withdraw his plea; the State requested that the DWI charge be nolle prossed even though it did not object to the plea and no new circumstances had occurred. The State knew at the time the plea was entered that the facts existed for prosecution for vehicular assault and manslaughter, yet the State made no objection to the plea; all the events necessary to the greater crime had taken place at the time of the plea.

The underlying policy of the Double Jeopardy Clause is to prevent the State, with all of its resources and power from making repeated attempts to convict an individual of an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity. This case illustrates exactly the type of overreaching actions from which defendants should be protected by the Double Jeopardy Clause. The State, in violation of this Court's dictates in *Jeffers*, charged the Petitioner with greater and lesser included offenses separately, then attended the plea for the lesser offense, listened to the statements made by the Petitioner to establish the factual basis for the plea while gathering information helpful to the pursuit of the greater charge, then amended the greater charge and pursued that case. If this scenario is allowed to stand, the result will be to encourage the State to engage in the improper charging process illustrated here, to subject Defendants to multiple prosecutions for the

same acts and to offer no element of finality to guilty pleas. This Court has said that a plea of guilty is itself a conviction. Like a verdict of a jury it is conclusive. More is not required; the court has nothing to do but give judgment and sentence. *Kercheval v. United States*, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927). The court below allowed no such finality to stand with Petitioner's guilty plea.

According to *Jeffers*, *Brown* and *Kercheval*, the District Court for the Western District of Missouri was correct in entering a writ of habeas corpus ordering Petitioner's release since the trial and convictions for vehicular assault and manslaughter violated his Fifth Amendment Double Jeopardy rights. Review by this Court is necessary to correct the error by the Eighth Circuit Court of Appeals overturning the District Court's Order.

B. The Eighth Circuit Court of Appeals has rendered a decision in conflict with the decisions of other United States courts of appeals on the same matter.

There is a split between the Circuits as to the effect an accepted guilty plea has on subsequent prosecutions. The majority, as the State of Missouri conceded below, holds that jeopardy attaches when a guilty plea is unconditionally accepted by the Court and subsequent prosecutions are therefore barred. Review by this Court is needed to end the inconsistent treatment of a guilty plea for double jeopardy purposes which exists between the Circuits.

The Second, Third, Sixth and Ninth Circuits have held that once the court accepts the guilty plea, the defendant is placed in jeopardy and subsequent prosecutions are barred. *United States v. Cambindo Valencia*, 690 F.2d 603, 637 (2nd Cir. 1979) *cert denied*, 446 U.S. 940, 100 S.Ct.2163, 64 L.Ed.2d 795 (1980); *United States v. Felton*, 753 F.2d 276, 278 (3rd Cir. 1985), *cert denied*, 483 U.S. 1008, 107 S.Ct. 3235, 97 L.Ed.2d 740 (1985); *Riadon v. United States*, 274 F.2d 304, 306 (6th Cir.), *cert denied*, 364 U.S. 896, 81 S.Ct. 225, 5 L.Ed.2d 189 (1960); *United States v. Faber*, 57 F.3d 873, 874 (9th Cir. 1990).

The Fifth and Eleventh Circuits have held that jeopardy attaches upon acceptance of the guilty plea but that attachment begins rather than ends the inquiry. The Courts in both of these Circuits, concluded that because the defendant's plea was withdrawn due to his actions, the attachment of jeopardy upon acceptance of the plea did not bar subsequent prosecutions. *Franshaw v. Lynaugh*, 810 F.2d 518, 523 (5th Cir.) *cert denied*, 483 U.S. 1008, 107 S.Ct. 3237, 97 L.Ed.2d 742 (1987); *United States v. Baggett*, 901 F.2d 1546, 1548 (11th Cir. 1990) *cert denied*, 498 U.S. 862, 111 S.Ct. 168, 112 L.Ed.2d 133 (1990).

The First and Tenth Circuits have held that jeopardy does not attach until sentence is imposed on the plea. *United States v. Santiago Soto*, 825 F.2d 616, 620 (1st Cir. 1987), *United States v. Combs*, 634 F.2d 1295 (10th Cir. 1980), *cert denied*, 451 U.S. 913, 101 S.Ct. 1987, 68 L.Ed.2d 304 (1981).

Prior to the case at bar, the Eighth Circuit has held that jeopardy attaches upon acceptance of the guilty plea and that subsequent prosecutions would be barred.

United States v. Bullock, 579 F.2d 116, 118 (8th Cir. 1978), *cert denied*, 439 U.S. 967, 99 S.Ct. 456, 58 L.Ed.2d 425 (1978). In the case at bar, the Eighth Circuit Court of Appeals has rendered an opinion in conflict with the prior Eighth Circuit rulings as well as in conflict with rulings in other Circuits. The Court below again assumed that jeopardy attached upon acceptance of the guilty plea but held that the attachment did not bar the subsequent prosecution because the plea did not constitute an acquittal of the greater charges.

It is clear that there is no consistency between the circuits as to when jeopardy attaches and the effect the attachment of jeopardy has in guilty plea situations. It is also clear that this is not an issue which will be resolved without this Court's guidance. The issue has been repeatedly addressed for a number of years and continues to reap conflicting opinions between the circuits as well as within circuits. While some circuits are diametrically opposed, others reach similar conclusions using different rationales. Review by this Court is very important. The double Jeopardy Clause is an essential right granted to individuals by the Constitution yet there is no consistency even within the Eighth Circuit itself to which individuals can look in order to know what he faces when he pleads guilty to a charge. This Court's guidance is essential if every individual is to be properly and equally afforded the protections of the Double Jeopardy Clause.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the judgment and opinion of the Eighth Circuit to ensure fair and consistent enforcement of the protections meant to be afforded by the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 95-1465

James E. Bally, Appellee, v. Mike Kemna, Superintendent, Western Missouri Correctional Center; Attorney General of the State of Missouri, Appellants.	* * * * * * * * * * * * * * *	Appeal from the United States District Court for the Western District of Missouri.

Submitted: June 13, 1995

Filed: September 7, 1995

Before BOWMAN, Circuit Judge, HENLEY, Senior Circuit Judge, and MORRIS SHEPPARD ARNOLD, Circuit Judge.

HENLEY, Senior Circuit Judge.

The State of Missouri appeals from a judgment of the district court granting James E. Bally's petition for a writ of habeas corpus under 28 U.S.C. § 2254. We reverse.

The parties do not dispute the following:

> Bally was intoxicated on November 28, 1991 . . . when he drove his car past a stop sign

> without stopping. His car crashed into the side of another car in which Robert Thomason, Thomason's wife, and their one-year old son were riding. Thomason and his wife were seriously injured. Their son sustained minor injuries. In two separate cases, the state charged Bally with driving while intoxicated [DWI] and second degree vehicular assault. Thomason died ten days later. The next day, on December 9, Bally surprised the state by suddenly pleading guilty to the DWI charge in an unscheduled hearing he arranged.
>
> The state did not object to the proceeding. The court accepted Bally's plea but delayed sentencing until an investigation was completed. On December 27, before the investigation was complete, the state asked the court for leave to nolle prosequi the DWI charge. The court granted the request on January 3, 1992, after a hearing. After the state dismissed the DWI charge, it amended the still-pending vehicular assault charge to add an involuntary manslaughter charge and prosecuted Bally for both.

State v. Bally, 869 S.W.2d 777, 778 (Mo. Ct. App. 1994) (footnote omitted).

Bally moved to dismiss the indictment for vehicular assault and manslaughter on double jeopardy grounds. The trial court denied the motion and the case proceeded to trial. The jury convicted Bally on both counts.

Bally appealed, arguing that because DWI was a lesser included offense of vehicular assault and manslaughter and because jeopardy attached when the trial court accepted his guilty plea to DWI, the state could not prosecute him on the greater offenses. The state appellate

court rejected his argument. The court did not dispute that DWI was a lesser included offense of vehicular assault and manslaughter and that double jeopardy bars prosecution for a greater offense after a defendant has been acquitted of a lesser included offense. *Id.* at 779. The court also acknowledged that the general rule appeared to be that jeopardy attached when a court unconditionally accepted a guilty plea. *Id.* at n.5. However, the court found it unnecessary to decide when jeopardy attached because it believed that a nolle prosequi dismissal with leave of the court was not the "fundational equivalent of a acquittal." *Id.* at 779.

The state court also relied on the so-called "sword" exception of *Ohio v. Johnson*, 467 U.S. 493 (1984). In *Johnson*, the Supreme Court held that double jeopardy did not bar prosecution on the remaining counts of an indictment after a trial court, over the state's objection, accepted a defendant's pleas to lesser included offenses. *Id.* at 494. In the facts of the case, the Court believed that "[n]othwithstanding [sic] the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword to prevent the State from completing its prosecution of the remaining charges." *Id.* at 502. In *Bally*, the state court believed that "Bally's decision to plead guilty to DWI, with only minutes notice to the prosecutor . . . constitute[d] an impermissible use of the Fifth Amendment as a 'sword.' " 869 S.W.2d at 780.[1]

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[1] On direct appeal, the state did not dispute Bally's contention that it knew at the time of the plea hearing that Thomason had died, 869 S.W.2d at 778 n.1, and, as to the manslaughter

Bally then filed this habeas petition, which the district court granted. Relying on *United States v. Bullock*, 579 F.2d 1116, 1118 (8th Cir.), *cert. denied*, 439 U.S. 967 (1978), the district court agreed with Bally that jeopardy attached when the trial court accepted his guilty plea to DWI. The court reasoned that because jeopardy had attached double jeopardy barred prosecution of the greater offenses of vehicular assault and manslaughter. The court also believed that *Ohio v. Johnson* did not apply, because in that case the prosecutor had charged the defendant in a single indictment charging greater and lesser offenses and had objected to acceptance of guilty pleas to the lesser offenses, whereas in the instant case the prosecutor had charged Bally in two separate indictments and had not objected to acceptance of the plea.

"The Double Jeopardy Clause . . . affords a defendant three basic protections[.]"[2] *Ohio v. Johnson*, 467 U.S. at

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charge, apparently did not rely on the "necessary facts" exception to double jeopardy. This exception "may exist where the State is unable to proceed on the more serious charge at the outset because the additional facts necessary to sustain that charge have not yet occurred or have not been discovered despite the exercise of due diligence." *Brown v. Ohio*, 432 U.S. 161, 169 n.7 (1977).

[2] The Double Jeopardy Clause . . . is stated in brief compass: '[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb.' " *Crist v. Bretz*, 437 U.S. 28, 32 (1978). "But this deceptively plain language has given rise to problems both subtle and complex[.]" *Id.* Justice Rehnquist has observed that "[d]espite its roots in antiquity, however, this guaranty [against double jeopardy] seems both one of the least understood and . . . most frequently litigated provisions of the Bill of Rights." *Whalen v. United States*, 445 U.S. 684, 699 (1980) (Rehnquist, J., dissenting).

497-98. " '[I]t protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense.' " *Id.* (quoting *Brown v. Ohio*, 432 U.S. 161, 165 (1977)). Moreover, "the Double Jeopardy Clause prohibits prosecution of a defendant for a greater offense when he has already been tried and acquitted or convicted on the lesser included offense." *Id.* at 501. Where, as here, "successive prosecutions are at stake, the [Double Jeopardy Clause] serves a 'constitutional policy of finality for the defendant's benefit.' " *Brown v. Ohio*, 432 U.S. at 165 (quoting *United States v. Jorn*, 400 U.S. 470, 479 (1971) (plurality opinion)). More specifically, "the bar to retrial following acquittal or conviction ensures that the State does not make repeated attempts to convict an individual, thereby exposing him to continued embarrassment, anxiety, and expense, while increasing the risk of an erroneous conviction or an impermissibly enhanced sentence." *Ohio v. Johnson*, 467 U.S. at 498-99.

"As an aid to the decision of cases in which the prohibition of the Double Jeopardy Clause has been invoked, the courts have found it useful to define a point in criminal proceedings at which the constitutional purposes and policies are implicated by resort to the concept of 'attachment of jeopardy.' " *Serfass v. United States*, 420 U.S. 377, 388 (1975). The Supreme Court has held that "[i]n the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn[,]" and "[i]n a nonjury trial- . . . when the court begins to hear evidence[,]" *id.*, but has not yet decided when jeopardy attaches to a guilty plea. *See Ricketts v. Adamson*, 483 U.S. 1, 8 (1987) ("We may

assume that jeopardy attached at least when respondent was sentenced . . . on his plea of guilty[.]"). It follows, of course, only if jeopardy has attached "does any subsequent prosecution of the defendant bring the guarantee against double jeopardy even potentially into play." *Crist v. Bretz*, 437 U.S. 28, 33 (1978).

In this appeal, the state does not challenge the district court's observation that as a general rule courts have held that jeopardy attaches when a trial court unconditionally accepts a guilty plea.[3] *See Fransaw v. Lynaugh*, 810 F.2d 518, 523 n.9 (5th Cir.) (collecting cases). *cert. denied*, 483 U.S. 1008 (1987). The state also acknowledges that in *United States v. Bullock*, 579 F.2d at 1118, this court stated: "Of course, jeopardy would attach when a plea of guilty is accepted." However, the state argues the statement in Bullock is dictum and that this court has never resolved the issue.

The state then requests that this court adopt the position of the Tenth Circuit in *United States v. Combs*, 634 F.2d 1295, 1298 (10th Cir. 1980), *cert. denied*, 451 U.S. 913 (1981), which indicated that jeopardy does not attach upon acceptance of a guilty plea but only attaches upon sentencing and entry of judgment. The state argues that acceptance of a guilty plea does not implicate the policies behind the Double Jeopardy Clause. In particular, the state argues "mere acceptance of a guilty plea does not carry the same expectation of finality and tranquility that comes with a jury's verdict or with an entry of judgment

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[3] In this appeal the state concedes, as it did in the past, that DWI is a lesser included offense of vehicular assault and manslaughter.

and sentence[,]" *United States v. Santiago Soto*, 825 F.2d 616, 620 (1st Cir. 1987), and a guilty plea hearing does to entail the expense, strain, or embarrassment of a trial and at a hearing the prosecution does not have the opportunity to "hone its presentation of its case through a trial." *Ohio v. Johnson*, 467 U.S. at 501. The state also notes that in certain circumstances Missouri law prohibits entry of judgment even though a judge accepts a guilty plea, citing Mo. S. Ct. R. 24.02(e).

Bally responds that the statement in *Bullock* was holding, not dictum. In any event, he argues that this court should follow the rule that jeopardy attaches upon acceptance of a guilty plea. He argues that he suffered strain and embarrassment at the plea hearing. Moreover, he argues that jeopardy means "risk of a determination of guilt," *Serfass v. United States*, 420 U.S. at 391, and asserts that he was put at risk of conviction of vehicular assault and manslaughter because at the plea hearing he admitted he was driving while intoxicated. Bally also argues that to hold that jeopardy attaches upon sentencing would be unworkable in Missouri because of state law concerning suspended imposition of sentence, citing Mo. Rev. Stat. §§ 557.001, 559.012.

We agree with the state that the statement in *Bullock* was dictum. In *Bullock*, 579 F.2d at 1118, the court was not concerned with acceptance of a guilty plea, but merely held that jeopardy did not attach when the government returned checks defendants had tendered in response to a notice of a violation indicating they could forfeit bond in lieu of a trial. We also agree with the state that we have never definitely determined when jeopardy attaches to a guilty plea. *See United States v. Britt*, 917 F.2d 353. 356 n.3

(8th Cir. 1990) ("assume for purposes of this discussion that jeopardy attached when [defendant's] guilty plea was accepted by the court"), *cert. denied*, 499 U.S. 1090 (1991); *United States v. Williams*, 534 F.2d 119, 120 (8th Cir.) (same), *cert. denied*, 429 U.S. 894 (1976).

Moreover, we note that several federal courts have questioned the rationale of cases holding that jeopardy attaches upon acceptance of a guilty plea, *See United States v. Foy*, 28 F.3d 464, 471 n. 13 (5th Cir.), *cert. denied*, 115 S. Ct. 610 (1994); *Gilmore v. Zimmerman*, 793 F.2d 564, 570 (3d Cir.), *cert. denied*, 479 U.S. 962 (1986), and in *United States v. Santiago Soto*, 825 F.2d at 620, the First Circuit was expressly held that "jeopardy did not attach when the district court accepted the guilty plea to the lesser included offense and then rejected the plea without having imposed sentence and entered judgment." However, in this state habeas case where both parties cite state law concerning guilty pleas and sentencing, we decline to fashion a rule concerning when jeopardy attaches to a guilty plea.[4] As in the past,, we assume that jeopardy attached when the court accepted the guilty plea, but "the conclusion that jeopardy has attached begins, rather than ends, the inquiry as to whether the Double Jeopardy Clause bars retrial." *Illinois v. Sommerville*, 410 U.S. 458, 467 (1973). For example, in *Ricketts v. Adamson*, 483 U.S. at 8, the Court assumed that jeopardy attached when the

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[4] We are aware that in *Crist v. Bretz*, 437 U.S. at 38, the Supreme Court held that the federal rule that jeopardy attaches in a jury trial when the jury is empaneled and sworn was an "integral part of the constitutional guarantee against double jeopardy" and thus binding on the states.

defendant was sentenced on a guilty plea, but held that double jeopardy did not bar prosecution on greater offenses after he breached the plea agreement. *See also United States v. Britt*, 917 F.2d at 357.

In situations where jeopardy has attached, the Supreme Court has abjured "right, mechanical rule[s]" to determine when retrial does not violate double jeopardy, *Illinois v. Sommerville*, 410 U.S. at 467, even though the Court has acknowledged that the resulting decisions "can hardly be characterized as models of consistency and clarity." *Burks v. United States*, 437 U.S. 1, 9 (1978). Instead, the Court has made clear that in determining whether reprosecution is barred following the attachment of jeopardy, "[e]ach case must turn on its facts." *Downum v. United States*, 372 U.S. 734, 737 (1963). The Court believed that the case-by-case approach was necessary because "the purpose of law to protect society from those guilty of crimes frequently would be frustrated by denying courts power to put the defendant to trial again." *Illinois v. Sommerville*, 410 U.S. at 470 (quoting *Wade v. Hunter*, 336 U.S. 684, 689 (1949)).

In the circumstances of this case, we believe that double jeopardy does not bar prosecution on the vehicular assault and manslaughter charges. We have observed that "[t]he protection afforded by the double jeopardy clause varies depending on whether or not there has been a final resolution on the merits of the charges against the accused." *United States v. Dixon*, 913 F.2d 1305, 1310 (8th Cir. 1990).We agree with the state that there has been no final resolution of the merits of the vehicular assault and manslaughter charges. As the Supreme Court noted in *Ohio v. Johnson*, 467 U.S. at 501-02.

> [t]he acceptance of a guilty plea to lesser included offenses while charges on the greater offenses remain pending . . . has none of the implications of an "implied acquittal" which results from a verdict convicting a defendant on lesser included offenses rendered by a jury charged to consider both greater and lesser included offenses.

In fact, in *United States v. Williams*, 534 F.2d at 121-22, which was decided eight years before *Johnson*, we rejected the argument that a guilty plea to a lesser included offense was an implied acquittal of the greater offense. In the course of holding that double jeopardy did not bar prosecution on greater offense after a defendant has his guilty plea to a lesser offense vacated, we stated:

> [Defendant] was not, in the proceedings in which his guilty plea was accepted, in direct peril of being convicted and punished for violating [the greater offenses]. He was not forced to run the gauntlet on those charges. No trier of fact refused to convict on those charges and none was given the choice between finding him guilty on either of those charges. . . . The district judge had the . . . options of accepting or rejecting the plea on the [lesser] charge. By accepting it he made no determination, explicit or implicit, on the merits of the charges not embraced in the plea. There was no implicit acquittal. . . . A plea to a lesser charge necessarily deprives court and jury of an opportunity to consider the greater charge.

Id. at 121-122 (footnote omitted). Although *Williams* is distinguishable because in that case the defendant sought

to have his guilty plea set aside, we nonetheless believe the above reasoning applies to the instant case.

We also realize that *Ohio v. Johnson* is distinguishable. As the district court pointed out, in that case the state charged the defendant in a single indictment and objected to acceptance of guilty pleas, whereas Bally was charged in two indictments and the state did not object to acceptance of his plea. However, faced with similar circumstances in *United States v. Santiago Soto*, 825 F.2d at 619, the Fifth Circuit has also relied on *Ohio v. Johnson* to conclude that double jeopardy did not bar a second indictment charging greater offenses after a court accepted but, over the government's objection, sua sponte vacated a guilty plea. The court believed *Johnson* was instructive even though charges for the greater offenses were not even pending at the time of the plea, reasoning that "[u]nderlying *Johnson* is the proposition that acceptance of a guilty plea is legally different from a conviction based on a jury's verdict." *Id.*

Because we believe that acceptance of Bally's guilty plea to DWI did not constitute an implied acquittal of the vehicular assault and manslaughter charges, we hold that Bally's prosecution on those charges did not violate the Double Jeopardy Clause. We therefore do not address the state's alternative argument that Bally's alleged inequitable conduct constituted an impermissible use of double jeopardy as a "sword."

Accordingly, we reverse the judgment of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
ST. JOSEPH DIVISION

JAMES E. BALLY, Petitioner, v. MIKE KEMNA, Superintendent, Western Missouri Correctional Center, and the ATTORNEY GENERAL OF THE STATE OF MISSOURI, Respondents.	)	No. 94-6155-CV-SJ-6

ORDER

(Filed Jan. 23, 1995)

Petitioner, a convicted state prisoner currently confined at the Western Missouri Correctional Center in Cameron, Missouri, has filed a petition for writ of habeas corpus pursuant to 26 U.S.C. § 2254 (1976). Petitioner challenges his convictions and sentences for vehicular assault ("assault") and vehicular manslaughter ("manslaughter"), which were entered on October 12, 1992, in the Circuit Court of Buchanan County, Missouri. Petitioner's sole ground for relief is that jeopardy attached at the trial court's acceptance of his plea of guilty to driving while intoxicated ("DWI"), a misdemeanor and a lesser included offense of the assault and manslaughter charges.[1] Petitioner contends that the prosecutor's action

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[1] Respondents do not dispute that the DWI charge is a lesser included offense of the assault and manslaughter charges. Respondents' Exhibit D at 9-10, n. 1.

in entering nolle prosequi[2] in the misdemeanor action after acceptance of the plea but before sentencing does not constitute an exception to the Double Jeopardy Clause of the Fifth Amendment, and that his convictions therefore violate that clause.

Petitioner cites numerous federal cases in support of his contention that jeopardy attaches when a guilty plea is unconditionally accepted by the trial court. This appears to be the general rule, *see Fransaw v. Lynaugh*, 810 F.2d 518, 523, n. 9 (5th Cir. 1987), *cert. denied*, 483 U.S. 1008 (1987), as well as the rule in this circuit. *See U.S. v. Bullock*, 579 F.2d 1116, 1118 (8th Cir. 1978), *cert. denied*, 439 U.S. 967 (1978). Respondents' citation of state law to the contrary may be persuasive in state court; however, respondents should realize that a state court's interpretation of federal constitutional law carries little weight here, particularly where federal courts have not adopted the state court's interpretation.[3] The court is most persuaded by petitioner's reliance on Judge Hamilton's opinion in *Mitchell v. Circuit Court of Mississippi County*,

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[2] The State of Missouri was granted leave of court to file an entry of nolle prosequi in the misdemeanor action on January 3, 1992.

[3] Moreover, the principal case relied upon by respondents, *Jones v. State*, 771 S.W.2d 349 (Mo. Ct. App. 1989), did not address the precise issue presented here. The issue in *Jones* was whether jeopardy had attached where the State sought and was denied leave to nolle prosequi **prior to the plea.** In addition to respondents' failure to offer any citations directly on point, respondents have inexplicably failed to even acknowledge petitioner's citations to relevant federal cases within this circuit.

Missouri, No. 4:93CV1357 (E.D. Mo. June 17, 1993) (holding that petitioner's double jeopardy rights attached as to all charges when he pleaded guilty to the DWI charge and granting petition for writ of habeas corpus), which provides a useful analysis of the "unusual factual twist" in this case. *Mitchell* at 4.[4]

The relevant facts in *Mitchell* are nearly identical to the facts in the present case. The prosecutor in *Mitchell* filed an information charging the petitioner with assault on the same day that he charged the petitioner with DWI. Petitioner entered a guilty plea on the DWI charge, which was accepted by the trial court. The prosecutor's subsequent motion to nolle prosequi the DWI charge was granted by the court and the assault case was scheduled for trial. Upon consideration of Mr. Mitchell's petition for writ of habeas corpus, Judge Hamilton rejected the State's contention that prosecution on the assault charge did not constitute double jeopardy because the state court granted the prosecutor's motion to nolle prosequi the DWI charge. *Mitchell* at 5-6.

Judge Hamilton concluded that the facts of *U.S. v. Williams*, 534 F.2d 119 (8th Cir. 1976), *cert. denied*, 429 U.S. 894 (1976), could not be applied to the case before her. In *Williams*, defendant's plea was set aside due to a flaw in the initial proceedings. "In that circumstance, a subsequent trial does not constitute double jeopardy; it is merely continuing jeopardy that has application where

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[4] Pursuant to the court's order dated December 23, 1994, petitioner has advised the court that no appeal was filed following Judge Hamilton's ruling. Reply to Response to Order to Show Cause at 1.

criminal proceedings against an accused have not run their full course." *Williams*, 534 F.2d at 121. In contrast, the petitioner in *Mitchell* "did not seek or obtain reversal of his DWI conviction. Rather, the plea was set aside pursuant to the prosecutor's decision to enter a nolle prosequi." *Mitchell* at 5. Therefore, the court's determination of "whether there is 'some principle compelling the conclusion that [Petitioner's] initial jeopardy on the [assault and manslaughter charges] came to an end at some time prior to the . . . trial, *Mitchell* at 5 (quoting *Williams*, 534 F.2d at 121), "depends on the significance of the entry of a nolle prosequi." *Id.*

Under Missouri law, a "nolle prosequi is a discretionary right of the prosecution to cease prosecution of a cause at any time . . . The charge is dismissed and the accused is free to go . . . The charge may be brought again as long as the accused's double jeopardy rights have not attached so as to bar reprosecution." *Lawson*, 630 S.W.2d at 189. The question of when Mr. Bally's double jeopardy rights attached is a matter of federal constitutional law. As noted above, under federal law, petitioner's double jeopardy rights attached when the trial court accepted his plea of guilty to the DWI charge. Thus, the prosecutor was "not free to continue to prosecute the assault charge [or the manslaughter charge] after the entry of the nolle prosequi on the DWI charge." *Mitchell* at 6.

The State's rationale, accepted by the Missouri Court of Appeals, relies on the Missouri Supreme Court's ruling in *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238 (Mo. banc 1985) (holding that trial court may deny leave to nolle prosequi after it receives a jury verdict). This decision has little, if any, bearing on this case. First, the court

in *Drumm* did not address the question of a court's discretion to deny leave to nolle prosequi after receipt of a guilty plea. More importantly, the issue of double jeopardy was not before the *Drumm* court. If a question of double jeopardy had been presented in *Drumm*, it seems probable the court would have found that jeopardy *had* attached, since "[i]n the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn." *Serfass v. United States*, 420 U.S. 377, 389 (1975). Thus, I believe the state court erred in concluding, based on *Drumm*, that "a nolle prosequi granted with leave of court [is] an exception to double jeopardy analysis. . . . " *State v. Bally*, 869 S.W.2d 777, 780 (Mo. Ct. App. 1994).[5] Accordingly, it is hereby

ORDERED that the petition of James E. Bally for writ of habeas corpus is GRANTED,[6] and that said Writ shall

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[5] Judge Spinden's opinion seems largely based on the concept that the "double jeopardy clause is a protection from prosecutorial overreaching and misconduct." 869 S.W.2d at 778. Application of the protection goes considerably beyond that objective. *See, e.g., United States v. Dixon*, 913 F.2d 1305 (8th Cir. 1990) (sua sponte declaration of a mistrial, after prejudicial television news report).

[6] The court disagrees with respondents' suggestion that this ruling permits petitioner to "use the Double Jeopardy Clause as a sword. . . . " *Ohio v. Johnson*, 467 U.S. 493, 502 (1984). The court's statement in *Johnson* specifically referred to a situation where a respondent had offered to resolve only part of the charges in a single prosecution against him, and where "the State objected to disposing of any of the counts against respondent without a trial." *Id.* at 501. Neither of those factors were present here. Respondents did not object to petitioner's plea of guilty to the separate DWI charge. Moreover, the DWI charge was subsequently dismissed, in effect, at respondent's request.

issue forthwith from the Clerk of this Court directing petitioner's sentences to be vacated. It is further

ORDERED that the State of Missouri shall release petitioner within thirty (30) days of the date of this Order unless the State has filed a timely notice of appeal and application for stay, pursuant to Fed. R. Civ. P. 62(d).

/s/ Howard F. Sachs
HOWARD F. SACHS
SENIOR DISTRICT JUDGE

Dated: 1/23, 1995.

JAMES E. BALLY,
Petitioner,
v.
MIKE KEMNA, Superintendent, Western Missouri Correctional Center, and the ATTORNEY GENERAL OF THE STATE OF MISSOURI,
Respondents.

No. 94-6155-CV-SJ-6

WRIT OF HABEAS CORPUS

This matter having been brought before the court upon the issues joined herein, and the same having been duly heard and submitted, and due consideration having been thereon had, it is by the court now here ordered that the said named person in whose behalf the writ of habeas corpus was sued out is illegally restrained of his liberty, as alleged in the petition herein, and that the sentence against petitioner is hereby vacated and that the State of Missouri release the petitioner within thirty days of the date of this Order unless the State has filed a timely notice of appeal and application for stay, pursuant to Fed. R. Civ. P. 62(d).

Entered this 23rd day of January, 1995.

/s/ R.F. Connor
Clerk.

ORIGINAL Document # 12

[SEAL]

In the
Missouri Court of Appeals
Western District

STATE OF MISSOURI, Respondent,	)	WD 47136
v.	)	Opinion Filed:
JAMES E. BALLY, Appellant.	)	January 18, 1994

APPEAL FROM THE CIRCUIT COURT OF BUCHANAN COUNTY

The Honorable Patrick K. Robb, Judge

BEFORE KENNEDY, P.J., ULRICH and SPINDEN, JJ.

James Bally was intoxicated on November 28, 1991, in St. Joseph when he drove his car past a stop sign without stopping. His car crashed into the side of another car in which Robert Thomason, Thomason's wife, and their one-year-old son were riding. Thomason and his wife were seriously injured. Their son sustained minor injuries. In two separate cases, the state charged Bally with driving while intoxicated and second degree vehicular assault. Thomason died ten days later. The next day, on December 9, Bally surprised the state by suddenly pleading guilty to the DWI charge in an unscheduled hearing he arranged.

The state did not object to the proceeding.[1] The court accepted Bally's plea but delayed sentencing until an investigation was completed. On December 27, before the investigation was complete, the state asked the court for leave to *nolle prosequi* the DWI charge. The court granted the request on January 3, 1992, after a hearing. After the state dismissed the DWI charge, it amended the still-pending vehicular assault charge to add an involuntary manslaughter charge and prosecuted Bally for both.[2]

A jury convicted Bally of assault and manslaughter. The court sentenced him to three years in prison and fined him $5000 on the assault charge. He was sentenced to seven years in prison on the manslaughter charge, to be served consecutively with the assault sentence. Bally contends in his appeal that the prosecution of the assault and manslaughter charge violated his protection, under U.S. CONST. amend. V, from double jeopardy.[3] We disagree and affirm both convictions.

The Fifth Amendment's double jeopardy clause protects " 'against a second prosecution for the same offense

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[1] Bally contends, and the state does not deny it, that the prosecutor knew that Thomason had died.

[2] The state does not contest Bally's contention that DWI is a lesser included offense to vehicular manslaughter.

[3] The Fifth Amendment says, "[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb." Bally appealed primarily on the strength of the U.S. Supreme Court's decision in Grady v. Corbin, 435 U.S. 508 (1990). That case has been overruled. United States v. Dixon, ___ U.S. ___, 113 S. Ct. 2849, 125 L. Ed. 2d 556 (1993). We conclude, however, that Bally's conviction raised a valid Fifth Amendment issue notwithstanding his reliance on an overruled case.

after acquittal.' " *United States v. DiFrancesco*, 449 U.S. 117, 129 (1980) (quoting *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969)). The clause's basic rationale is:

> "[T]hat the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty."

Id. at 127-28 (quoting *Green v. United States*, 355 U.S. 184, 187-88 (1957)). The double jeopardy clause is a protection from prosecutorial overreaching and misconduct. Because a guilty verdict for a lesser-included offense is, for double jeopardy purposes, an implied acquittal of the greater offense, the state cannot prosecute a defendant for the greater offense. *Green v. United States*, 355 U.S. 184 (1957).[4]

The state argues that the Fifth Amendment is not implicated because jeopardy had not attached to Bally's plea of guilty to the DWI charge before the state entered its *nolle prosequi*. The state bases its argument on *Jones v.*

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[4] An exception to this rule exists when a defendant enters a guilty plea to the lesser offense over the state's objection, and the defendant is being tried for both offenses – the lesser and greater – in the same proceeding. In such a case, the guilty plea does not resolve the factual issue in the defendant's favor. Ohio v. Johnson, 467 U.S. 493 (1984) (because the greater offense was pursued in the same proceeding, the finality required for double jeopardy had not been reached). Neither component of this exception is involved in Bally's case.

State, 771 S.W.2d 349, 351 (Mo. App. 1989), in which this court's Eastern District said:

> For purposes of a plea of guilty, we may assume that jeopardy attaches when a defendant is sentenced on that plea. *Ricketts v. Adamson*, 483 U.S. 1 . . . (1987). Thus, if the State failed to terminate . . . prosecution prior to the imposition of sentence on his Alford plea, the double jeopardy clause barred reprosecution of . . . those same charges.

We do not need to decide, however, whether the *Jones* court was correct in its assumption[5] because the state's entry of a *nolle prosequi* was with leave of court. Such a dismissal does not constitute the functional equivalent of an acquittal, and, therefore, jeopardy does not attach.

The Supreme Court of Missouri has ruled that a *nolle prosequi* may not constitute an acquittal, depending on the circumstances. In *State v. Berry*, 298 S.W.2d 429, 431-32 (Mo. 1957) (citations omitted), the court explained:

> [T]he entry of a nolle prosequi . . . was not an acquittal and . . . did not place the defendant in jeopardy. . . . In the ancient and hortatory language of lawyers the effect of a nolle prosequi " ' "is to put the defendant without day, that is,

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[5] The federal courts hold that jeopardy attaches when the court unconditionally accepts a defendant's guilty plea. 3 Wayne R. LaFave and Jerold H. Israel, Criminal Procedure § 24.1 (1984); William S. McAninch, *Unfolding the Law of Double Jeopardy*, 44 S.C. L. Rev. 411, 419 (1993). The Ricketts case, upon which the Jones court relied, merely stated that the Supreme Court was assuming, without deciding, for purposes of determining that particular case, that jeopardy attached "at least" at sentencing. Rickets [sic], 483 U.S. at 8.

> he is discharged and permitted to leave the Court without entering into a recognizance to appear at any other time; but it does not operate as an acquittal, for he may afterwards be again indicted for the same offense, or fresh process may be issued against him upon the same indictment and he be tried upon it." ' " . . . The pendency of a former indictment or information . . . is not a bar to a second indictment or information for the same offense.

This position is consistent with the one taken by federal courts. In *Dortch v. United States,* 203 F.2d 709, 710 (6th Cir. 1953), *cert. denied,* 364 U.S. 814 (1953), the court said:

> It is . . . settled law that a nolle prosequi and a dismissal without prejudice do not bar a second prosecution for the same offense, inasmuch as such terminations are not tantamount to acquittal. See United States v. Fox, 3 Cir., 130 F.2d 56, certiorari denied, 317 U.S. 666, 63 S.Ct. 74, 87 L.Ed. 535, holding that a nolle prosequi, unlike an acquittal, does not free the accused from the prosecution of the offense charged and is not a bar to a second indictment covering the same offense.[6]

The court in *United States v. Shanahan,* 168 F. Supp. 225, 230 (S.D. Ind. 1958), concluded, "[T]he law is settled that

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[6] Although the federal courts are construing the effect of a *nolle prosequi* under Fed. R. Crim. P. 48(a), and not common law as the Berry court was, the effect is the same because the federal courts have concluded that dismissal pursuant to Rule 48(a) is equivalent to *nolle prosequi* under the common law. Dortch v. United States, 203 F.2d 709 (6th Cir. 1953), cert. denied, 364 U.S. 814 (1953); United States v. Shanahan, 168 F. Supp. 225 (S.D. Ind. 1958).

where the government dismisses a criminal action by leave of court, jeopardy does not attach[.]"

Early decisions by the Supreme Court of Missouri have ruled that a *nolle prosequi* occurring after jeopardy traditionally attaches – upon the jury's being sworn and empaneled – was the functional equivalent of an acquittal. *See State v. Mason*, 33 S.W.2d 895 (Mo. 1930); *State v. Linton*, 222 S.W. 847 (Mo. 1920); *State v. Patterson*, 22 S.W. 696 (Mo. 1893). In none of those cases, however, did the trial court grant leave.

The court in Bally's case did grant the state leave to enter *nolle prosequi* after a hearing on the state's motion. Indeed, the Supreme Court of Missouri has ruled that a court has a duty to review a state's *nolle prosequi* made after a jury's verdict.[7] *State ex rel. Norwood v. Drumm*, 691 S.W.2d 238 (Mo. banc 1985).

The rationale for treating a *nolle prosequi* granted with leave of court as an exception to double jeopardy analysis is clear. A court determines whether *nolle prosequi* is, in the words of the *Drumm* court, consistent with "the public interest in the fair administration of criminal justice." *Id.* at 241. This assuages the primary concern of double

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[7] A court's acceptance of a guilty plea is equivalent to a jury verdict. As the United States Court of Appeals, Third Circuit, said, "The defendant . . . was not found guilty by a jury of his peers but by his own plea. . . . [T]hat is a distinction without a difference." United States v. Fox, 130 F.2d 56, 58 (3d Cir. Pa.), cert. denied, 317 U.S. 666 (1942). "Like a verdict of a jury [a guilty plea] is conclusive. . . . [T]he court has nothing to do but give judgment and sentence." Kercheval v. United States, 274 U.S. 220, 223 (1927).

jeopardy analysis: preventing prosecutorial misconduct and overreaching.

Hence, because the state's *nolle prosequi* in Bally's case was entered with leave of court, double jeopardy did not attach so as to bar further prosecution of the DWI charge or any greater offenses. As this court's Eastern District said, in *State v. Lawson*, 630 S.W.2d 185, 189 (Mo. App. 1982), "The filing of a nolle prosequi . . . results in a dismissal, and . . . the dismissal is without prejudice if the accused's double jeopardy rights do not bar reprosecution."

Moreover, the United States Supreme Court has refused to permit a defendant from using the Fifth Amendment as a "sword" to thwart the state's prosecution of him. The Supreme Court enunciated the "sword exception" in *Ohio v. Johnson*, 467 U.S. 493, 502 (1984), where it "made clear that a criminal defendant is not 'entitled to use the Double Jeopardy Clause as a sword.' " *United States v. Quinones*, 906 F.2d 924, 928 (2d Cir. 1990), *cert. denied*, 498 U.S. 1069 (1991) (quoting *Johnson*, 467 U.S. 493).

In *Quinones*, the court considered the case of a defendant who, learning that a grand jury was soon to hand down a second indictment charging him with a third offense growing out a single drug sale, pleaded guilty – to the prosecution's surprise – to the original indictment's charges of possessing cocaine and conspiring to distribute it. The prosecutor objected and announced to the court that another indictment was forthcoming. The court admonished the defendant that its acceptance of his plea would not block prosecution of the new indictment.

When the second indictment came down after the guilty plea, the defendant moved to dismiss it on the ground that it violated his Fifth Amendment protection against double jeopardy. In rejecting the double jeopardy claim, the court noted that the defendant's "maneuver was designed to cut off the possibility that appellant would be prosecuted on an additional charge." *Quinones*, 906 F.2d at 926.

Bally's decision to plead guilty to DWI, with only minutes notice to the prosecutor, was a similar maneuver. The state was not dilatory in charging Bally with manslaughter. It had no basis for charging him until Thomason died. Bally took advantage of the state's unpreparedness by suddenly pleading guilty to a misdemeanor in hopes of blocking a felony manslaughter charge. This constitutes an impermissible use of the Fifth Amendment as a sword.

We conclude that because the *nolle prosequi* entered in Bally's DWI case was not an acquittal but a dismissal without prejudice, the state acted within its rights to continue to prosecute the still-pending assault charge and to add the manslaughter charge even though both were greater offenses to the DWI charge. We also apply the "sword exception" in upholding the manslaughter conviction. We affirm the convictions.

Paul M. Spinden, Judge

All concur.

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 95-1465WMSJ

James E. Bally, Appellee, v. Mike Kemna, et al. Appellants.	*	Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

October 13, 1995

Order Entered at the Direction of the Court:

/s/Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit